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In the Supreme Court of the United States

October Term, 1940.

GEORGE DIXON, JAMES COLE, HARVEY H. HESS, EDWARD A. TYRONE AND W. A. MYATT, *Petitioners.*

vs.

UNITED STATES OF AMERICA, *Respondent.*

Petition for Writ of Certiorari, and Brief in Support of Petition.

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The penalties prescribed by section 2857, U. S. C. A., cannot be imposed for making false entries except on forms prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, and making false entries on commercial invoices, the form for which was not prescribed by the Commissioner and approved by the Secretary, does not constitute a violation of section 2857, U. S. C. A. 7

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PETITION FOR WRIT OF *CERTIORARI.*

The question involved in this controversy is whether or not a delegation of power by Congress to a selected instrumentality in the Executive Department may by such selected instrumentality be in turn delegated to and exercised by another instrumentality in the Executive Department.

The essential facts out of which this controversy arose are these:

The petitioners were officials, agents and employees of Southwestern Distilled Products, Inc., a licensed wholesale liquor dealer, located at Sulphur Springs, Arkansas, during the year 1939. As such they were subject to the provisions of section 2857, title 26, United States Code Annotated, section 2857, Internal Revenue Code, 1939, which reads as follows:

> "Every rectifier and wholesale liquor dealer shall keep daily, at his place of business covered by his spe-

cial tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records; *Provided*, that the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The record shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe.

"The records required to be kept under the provisions of this section and regulations issued pursuant thereto, shall be preserved for a period of four years, and during such period shall be available during business hours for inspection and the taking of abstracts therefrom by the Commissioner or any internal revenue officer.

"Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, or to make entries therein, or cancels, alters, or obliterates any entry therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, or makes any false entry therein, or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years.

"Every rectifier and wholesale liquor dealer who refuses or neglects to render transcripts or summaries in the form required by the Commissioner, with the approval of the Secretary, shall, upon conviction, be fined not more than $100 for each such neglect or refusal."

The petitioners were charged by indictment, containing forty-eight counts, in the United States District Court for

the Western District of Arkansas, with violation of the foregoing section, and were found guilty as charged in twenty-nine counts, nineteen counts having been dismissed.

George Dixon was sentenced to pay a fine of $21,750.00 and to imprisonment for a period of eight years; James Cole was sentenced to pay a fine of $5,000.00 and to imprisonment for a period of four years; Harvey H. Hess was sentenced to pay a fine of $2,900.00 and to imprisonment for a period of two years; Edward A. Tyrone was sentenced to pay a fine of $500.00 and to imprisonment for a period of fifteen months; W. A. Myatt was sentenced to pay a fine of $500.00 and to imprisonment for a period of fifteen months.

All counts in the indictment were identical in their nature, the only difference being as to the dates, names and addresses. In substance, the indictment charged that the petitioners, being officers, agents and employees of Southwestern Distilled Products, Inc., a corporation engaged in the business of a wholesale liquor dealer in Sulphur Springs, Benton County, Arkansas, under authority of a United States special tax stamp, did unlawfully, knowingly, wilfully, fraudulently, and feloniously make false entries in the records required by law to be kept by said corporation of the distilled products disposed of by said corporation in that they did sell to named persons certain quantities of whiskies, gin and grain alcohol, a record of such sales having been made by petitioners on commercial invoices, on which invoices entries were made showing sold to a certain person at a certain address, thereby purporting to show and state that said spirits had been sold to such person who resided at and had a place of business at said address, which entries were false in that the liquor had not been sold to such person or that such person did not have a place of business or reside in such city, or at said address but resided at an address in a city in the State of Oklahoma or the State of Kan-

sas, naming it, all of which was known to the petitioners at the time of making said false entries in said invoices.

The invoices were on printed forms and were filled in by writing the date, name and address of purchaser with his vehicle license, number of cases and brands of liquor, serial number of cases and price. At the bottom of the form was printed an affidavit required to be executed by the purchaser or his agent. Photostats of this form appear on pages 111 and 113 of the record submitted herewith. That invoice was the basis of count one of the indictment.

The Soutwestern Distilled Products, Inc., was required to keep a record of all transactions involving the sale of liquor from its store for which its stamp had been issued. These records were required to be kept in accordance with the rules and regulations prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury and kept on forms prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury. The Commissioner, with the approval by the Secretary of the Treasury, had prescribed rules and regulations governing the conduct of the business of a wholesale liquor dealer, which rules and regulations are set forth and form a part of Form 338, which report is required to be made monthly by each wholesale liquor dealer to the District Supervisor of the Alcohol Tax Unit, showing a recapitulation of all merchandise received and disposed of during the month. The rules and regulations required that a wholesale liquor dealer keep a record on Form 52, which form allows for the recording of all liquors received and all liquors disposed of daily by the wholesale liquor dealer. Form 52 is divided into two parts, one called 52-A and one called 52-B. On Form 52-A the wholesale liquor dealer was required to record within twenty-four hours after the transaction occurred a record of all receipts of liquor in the place of business, showing the

distillery or manufacturer, with its address, the brand of the liquor, proofage, the quantity and date received. On Form 52-B, the wholesale liquor dealer was required to record the name and address of the consignee to whom the liquor was sent, the brand thereof, the quantity and the proofage and the serial number of the individual cases of liquor. The rules as disclosed on Form 338 provide that a wholesale liquor dealer could omit the writing of the serial numbers on Form 52-B, provided such serial number, together with other identifying data, was kept on a commercial invoice, to be approved in form by the District Supervisor of the Alcohol Tax Unit.

The petitioners were not charged with making false entries on Form 52-A or Form 52-B or Form 338, but they were charged with making false entries as to names and addresses of consignees on their commercial invoices. These invoices were required to be retained by the petitioners at their place of business with Forms 52-A and 52-B whereas Form 338 was required to be filed with the District Supervisor of the Alcohol Tax Unit. There was no evidence that the form of invoices on which the alleged false entries were made was prescribed by the Commissioner and/or approved by the Secretary, but the evidence disclosed that the form was prepared by the petitioners and submitted to the district supervisor for approval and that he aproved same.

At the trial the evidence showed that in each instance covered by the several counts in the indictment the address or the name of the consignee was untrue but that in each instance the invoice was written up as to name and address in accordance with the directions of the purchaser of the liquor shown to have been sold on such invoices. Over the objection of petitioners the court admitted in evidence the various invoices corresponding with the various counts of the indictment, the objection being that such forms were

not forms prescribed by the Commissioner and approved by the Secretary, and were therefore not forms the falsification of which was condemned by section 2857, *supra*.

At the close of the evidence of the government the petitioners demurred thereto and moved the court to instruct the jury to acquit the petitioners and upon the close of all the evidence the petitioners renewed their motion for an instructed verdict of not guilty, both of which were overruled and exceptions allowed.

Upon appeal to the Circuit Court of Appeals for the Eighth Circuit this question was advanced and the sole contention made that, because the form of commercial invoices on which the alleged false entries were made lacked prescription by the Commissioner and approval by the Secretary, as provided by the Act of Congress, the false entries made upon the invoices were therefore not false entries denounced by the section. The appellate court affirmed the judgment of the trial court, the opinion of that court being submitted herewith in the transcript of record as required by the rules of this court.

It is respectfully submitted that the learned trial judge was in error and that the Eighth Circuit Court of Appeals was likewise in error in affirming the judgment of the trial court, and that this court should grant a writ of *certiorari* for review of this record, in support whereof we submit a brief on the questions of law involved.

FRANK HICKMAN,
Attorney for Petitioners.